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SOME QUESTIONS UNDER S. 20 OF THE LIMITATION ACT.

Referring to the provisions in S. 21 of the Limitation Act in respect of 'joint contractors, partners, executors or mortgagees', Dr. Mitra observes that these particular cases are specifically mentioned, probably as cases 'in which the act of one of a set of persons is *likely* to be considered as the act of the others', and he proceeds to point out that this express mention of some does not justify an 'implication' to the contrary in *other* cases of plural liability but that each case must be decided with reference to the language of Ss. 19 and 20. Simple as this may seem, the practical application of the rule enacted by these sections is by no means free from difficulty. To take but an instance or two, it was held in *Gopal* v. *Gopal* [1] followed by Abdur Rahim, J. in *Srinivasa* v. *Echammal* [2] and by Seshagiri Aiyar, J. in *Kothandarama* v. *Shanmugam* [3] that payment by the principal debtor would not prevent time running against the surety; but this is inconsistent with the decision of the court of Appeal in England in *Allison* v. *Frisby* [4] and it is evident that the learned Judges who decided *Velayutham* v. *Vythilingam* [5] were not quite satisfied as to the correctness of the view taken in *Srinivasa* v. *Echammall* [2]. Again, in *Newbould* v. *Smith* [6] the court of Appeal (composed of Cotton, Lindley and Lopes, L. JJ.) held that a payment by a mortgagor *after* he had assigned the mortgaged property to a third party, (subject to the incumbrance) was insufficient to keep alive the mortgagee's claim as against the property in the hands of the third party; but there is an apparent inconsistency between this view and the decision of the House of Lords in *Chinnery* v. *Evans* [7]; and in *Domi Lal Sahu* v. *Rosham Dobay* [8] Maclean, C. J. and Holmwood, J. declined to follow *Newbould* v. *Smith* [6], in view of what they considered to be the clear effect of the language of S. 20 of the

1. (1903) I. L. R. 28 B. 248.
2. (1911) 21 M. L. J. 455.
3. (1915) 32 I. C. 608.
4. (1889) L. R. 43 Ch. D. 106.
5. (1912) 24 M. L. J. 66.
6. (1886) L. R. 33 Ch. D. 127.
7. (1864.) 11 H. L. C. 115
8. (1906) I. L. R. 33 C. 1278.

Indian Limitation Act. The course of decisions both in England and in India (even apart from the few cases already mentioned) bears testimony to the uncertainty of the law under this head; and it may therefore be useful to consider at some length the effect of the application of S. 20, particularly to certain cases of frequent occurrence like those of principal and surety, mortgagor and his assignee, the coheirs of a debtor etc.

It was pointed out in *Roddam* v. *Morley* [1] that the difficulty in the interpretation of the law in England was to some extent due to the fact that the framers of the English statute then under consideration 'had in their mind the single case of a sole obligor and that the case of a bond with several obligors or of a deceased obligor never occurred to them'. The Indian Legislature had not even that excuse—at any rate when framing the Act of 1877—for S. 21 shows that the case was present to their mind, and yet the language of the Indian Acts, as to the effect of part payment and payment of interest, is calculated to give rise to many of the doubts and difficulties which arose upon the construction of the English statute.

In view of some remarks of Seshagiri Iyer, J. in *Kothandarama* v. *Shanmugam* [2] it is necessary to draw attention to the difference between 'acknowledgments' and 'payments', in their respective effect upon the running of time. While S. 19 makes an acknowledgment effective only if made by the party against whom such property or right is claimed *i. e.*, by the person sued (or his predecessor in title), S. 20 only requires that interest should be paid 'by the person liable to pay the debt' and that part payment should be 'by the debtor' and, as will be presently shown, this need not always be the person sued (or his predecessor in title). (Cf. *Venkatakrishniah* v. *Subbarayudu* [3].)

It has sometimes been suggested—apparently on the analogy of the interpretation placed on S. 7 of Act XV of 1877, in *Seshan* v. *Rajagopala* [4] and *Vigneswara* v. *Bapayya* [5]—that where there are several persons liable (in one way or another) for a debt, a payment, to come under S. 20, must be made by or on behalf of *all* of them; but such a construction of S. 20 is opposed to the whole course of decisions in England on the corresponding

1. (1857) 1 De G. & J. 1.
2. (1915) 32 I. C. 608.
3. (1916) 3 L. W. 576.
4. (1890) I. L. R. 13 M. 236.
5. (1893) I. L. R. 16 M. 436.

provisions in the English Limitation Acts and was expressly disapproved of in *Velayutham* v. *Vythilingam* [1]. See also, *Hem Chandra Chaudhuri* v. *Purna Chandra Chaudhuri* [2].

In view of the opinion sometimes expressed as the reason for not following English precedents, that the principles of law and the language of the statute with reference to which those cases were decided are different from those governing us here, it is both necessary and desirable briefly to advert here to the law on the subject in England. A comparison of the changes made from time to time in the language of the Indian Limitation Acts with the course of judicial decisions in England will, it is submitted, clearly show that far from enacting a different rule, the Indian Legislature intended to adopt the view indicated by the English decisions of the time.

The state of the law in England prior to 1833, does not require any lengthy notice here. It is sufficient to say that prior to 1833, there was no *statutory rule* of limitation, in England, in respect of suits to recover money 'charged on land', and payment of interest or part payment of principal came to be relied on only as a means of rebutting the presumption of discharge arising from lapse of time. Even in cases governed by the early Statute of 21 Jac. I. C. 16, the rule as to part payment or payment of interest rested only on case law for a long time; but the rule of those days that such payment operates by way of a 'fresh promise' to pay what remains due has little significance after the introduction of statutory provisions on the point.

In putting the rule as to acknowledgments, part payments and payment of principal on a statutory basis, one of the statutes of 1833 (3 and 4 Wm. 4 C. 27 S. 40) used the following language:—'unless in the meantime some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing *signed by the person by whom the same shall be payable* or his agent' (cf. 37 and 38 Vic. C. 57 S. 8); S. 42 of the same Act (dealing with suits for arrears of rent or interest) referred to an acknowledgment * * * * 'signed by the person by whom the same was payable or his agent.' 'Another Act (3 and 4 Wm. 4 C. 42 S. 5) referred to an acknowledgment * * either by writing signed by the party liable by virtue of such indenture etc. or by part payment or

1. (1912) 24 M. L. J. 66. 2. (1914) 22 I. C. 510.

part satisfaction on account of any principal or interest being then due thereon etc.' There was no rule in England, prior to 1828 (as regards acknowledgments) and 1856 (as regards payment of interest or part payment of principal) corresponding to the exception known to the later law in respect of joint contractors etc., so that up to 1856, the law was that 'payment of interest or part payment, by one of several contractors, during the life of all, took the case out of the statute against the rest.' Even the provision introduced in 1856 (by the Mercantile Law Amendment Act) did not apply to partners nor to cases falling within S. 40 of 3 and 4 Wm. 4 C. 27 and (therefore) within S. 8 of 37 and 38 Vic. C. 57.

It may be noticed that the Indian statute (Act 14) of 1859 following the above statutes (except that the reference to 'agents' was omitted) recognised an acknowledgment in writing signed 'by the person who but for the law of limitation would be liable to pay the same.' The rule as to saving of limitation by part payment or payment of interest was considered by Sir B. Peacock unsuited to India and was therefore altogether omitted. On the English Statutes of 1833, two questions arose, (i) whether the words by the 'person by whom the same shall be payable' referred only to 'acknowledgments' or also to payments (towards interest or principal), (ii) when there are more persons than one liable, what is the effect of (*a*) an acknowledgment by one of them and (*b*) a payment by one of them, as against the rest, do far as limitation is concerned. It is important to note the secisions in England on these points, between 1859 and 1871 as that will enable us to realise the significance of the words employed in the Indian Limitation Act of 1871. On the first of these questions, judicial opinion in England was divided (cf. per Lords Westbury and Cranworth in *Chinnery* v. *Evans* [1]); but it was nevertheless recognised that as a matter of principle (if not by force of the language of the Statute) a payment by a stranger was not a payment within the intendment of the Statute, and the payment must therefore be *by a person liable to pay.* As to the second question, it is necessary to compare *Roddam* v. *Morley* [2], (a case as to part payment) decided by Lord Cranworth (with the advice of two Judges) in 1857 with *Bolding* v. *Lane* [3], (a case as to acknowledgments) decided by Lord Westbury in 1863. In the former case, a devisee for life had paid interest on a specialty

1. (1864) 11 H. L. C. 115. 2. (1857) 1 De G. & J. 1.
3. (1863) 1 De. G. J. & S. 122.

debt of his testator's and it was held (with reference to 3 and 4 William 4 C. 42, S. 5 quoted *supra*) that this sufficed to keep the creditor's right of action alive against *all parties* interested in remainder. Two points were involved in that decision (i) that though the devisee for life was not liable to the testator's creditor as a party to the contract (or by privity) he was nevertheless a 'party liable' within the meaning of the section inasmuch as he can be proceeded against (to the extent of assets) for the recovery of the debt. and (ii) that a payment within the section sets the action free *generally and not merely against the person paying* or his legal representative. The Lord Chancellor observed that in cases where there may be several persons liable, 'it never could have been contemplated that in order to prevent the operation of the statutory bar there must always be an actual payment by all the persons liable.' In *Bolding* v. *Lane* [1], (where the question had to be decided with reference to 3 and 4 Wm. 4 C. 27 S. 42 quoted *supra*) it was held that an *acknowledgment* by a mortgagor (in respect of arrears of interest due to a prior mortgagee) will not avail to save limitation as against a puisne mortgagee. The principle of the decision, as explained by Lord Westbury himself in the later case of *Chinnery* v. *Evans* [2], was, that while the words 'by whom the same is payable' are words of 'large import' so as to include the mortgagor and also the other mortgagees by whom the prior charge was payable, the effect of an acknowledgment by one of them should be confined to the interest of the individual giving the acknowledgment; for otherwise 'the mortgagor or his representative who may have no interest whatever in the lands (for the ultimate equity of redemption may not be worth one shilling) shall be enabled to charge that estate anew with any amount of arrears of interest as against the second and subsequent mortgagees.' Then came *Chinnery* v. *Evans* [2], in which the House of Lords held that payment of interest by an agent of the mortgagor would suffice to keep the mortgagee's remedy alive even as against assignees of the mortgaged property.

Viewed in the light of the above cases, the contrast in language between Ss. 20 and 21 of the Indian Limitation Act (9) of 1871 is significant, as also the difference as regards acknowledgments between the language of the Act of 1859 and that of the Act of 1871. The general language in Act 14 of 59 as to

1. (1863) 1 De. G. J. & S. 122. 2. (1864) 11 H. L. C. 115.

acknowledgment by 'the person who would be liable to pay' was changed so as to restrict the operation of an acknowledgment to 'the party to be charged therewith' so as to bring the law in line with the decision in *Bolding* v. *Lane* [1]. The next section as to saving of limitation by payment (which was for the first time introduced in 1871) adopts the wide language of the English cases, *i. e.* 'by the debtor' or 'by the person liable to pay the debt' and in the words of Lord Cranworth in *Roddam* v. *Morley* [2], the section 'does not confine his (the creditor's) right to a right of action against the person who has made the payment.' Nor does it say in respect of 'what action' limitation is saved by the payment, but provides generally for a new period of limitation 'according to the nature of the original liability.' It may be noted, in passing, that even these words 'according to the nature of the original liability' have been omitted in the Act of 1908. These considerations seem to justify the view that the law in India was meant to be the same as declared in England by *Bolding* v. *Lane* [1], and *Roddam* v. *Morley* [2], and that payments of interest and part payments were intended to have a wider operation than mere acknowledgments. See *Venkatakrishniah* v. *Subbarayudu* [3]. The following observations of Lord Hobhouse in *Lewin* v. *Wilson* [4], though made with reference to a foreign Statute, are so apposite in this connection that we make no apology for quoting them :—

"As regards the person making them, acknowledgment may, as pointed out in *Bolding* v. *Lane* [1], be made by a person who, though a party to the mortgage contract has ceased to have any substantial interest in it and has nothing to lose by the acknowledgment; whereas payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain and is not put upon any further assertion of his rights; but not so if he only receives acknowledgment. If therefore we find that the legislature has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning it."

1. (1863) 1 De. G. J. & S. 122.
2. (1857) 1 De. G. & J. 1.
3. (1916) 3 L. W. 576.
4. (1886) L. R. 11 A. C. 639.

It only remains to add that in recasting the section relating to acknowledgment in 1877 and 1908 and extending it to all rights (not merely debts or legacies) the principle of restricted operation is preserved by the use of the words 'party against whom such property or right is claimed' while in the case of 'payments' there is no indication (by any change of language) to exclude the logical developments of the rule in England. To complete the comparison, we may point out that the doctrine of agency (in the making of acknowledgments and payments) is allowed only restricted scope in India by requiring that the agent should be one 'duly authorised in this behalf' or (in the words of the Act of (1871)) 'generally or specially authorised in this behalf.' Some of the English decisions which rest on a rather liberal application of the theory of 'implied agency' will not to that extent be safe precedents in this country.

Principal and Surety.

In *Allison* v. *Frisby* [1], stress is laid by both Cotton and Fry, L. JJ. on the circumstance that S. (8) of the Real Property Limitation Act of 1874, dealing with payment of 'interest' etc., 'says nothing about the person by whom the money is paid'; and this is evidently what Jenkins, C. J. meant when he said in *Gopal* v. *Gopal* [2], that that case turned upon the construction of the particular statute. But, as against this, it has to be observed that other eminent Judges in England have, even as a matter of construction of the section, held that the words 'by the person by whom the same shall be payable' apply both to acknowledgments and to part payments. Lord Justice Cotton himself proceeds to say that the rule is satisfied 'if the payment is made by any one liable to pay'—the same language as in the Indian Act—and it is on this footing that that learned Judge holds that 'payment by either principal or surety takes the case out of the statute against both.' Jenkins, C. J. in *Gopal* v. *Gopal* [2], takes a different view, on the ground that the debt of the principal is different from that of the surety, that neither is liable to pay the debt of the *other* and that accordingly payment in respect of the one debt cannot be considered to be payment in respect of the other debt. The learned Chief Justice is of course right when he points out that there is a recognition of the difference between the respective liabilities of the two in the observations of Kay, J. and Bowen, L. J. in *Allison* v. *Frisby* [1], itself

1. (1889) L. R. 43 Ch. D. 106. 2. (1903) I.L.R. 28 B. 248.

and in the decision in *In re Powers, Lindsell* v. *Phillips* [1]. But we venture to doubt if those cases support the distinction in the sense in which and to the extent to which he seeks to use it. They held that where there is a suretyship in respect of a mortgage debt of another, the surety's liability does not itself become a liability 'charged on land' so as to bring the case within the 12 years' rule laid down by S. 8 of the Real Property Limitation Act of 1874. But in spite of the recognition of the distinction (whatever it may be) between the liabilities of the two, all the Judges of the Court of Appeal in England were able to hold that payment by one was sufficient to save limitation as against the other as well.

It must also be admitted that there is great force in the observation of Fry, L.J. in *Allison* v. *Frisby* [2], that it is usual for the principal debtor and not the surety to pay the interest and 'it would be contrary to good sense and the common understanding of mankind that while he is doing so, the statute should run in favour of the surety unless he makes a payment or gives an acknowledgment.' Is there then sufficient in the language of the Indian Statute law to preclude a similar view being adopted in this country? S. 20 of the Limitation Act speaks of a payment 'by the debtor' or 'by the person liable to pay the debt.' 'This of course implies that the debt must be *the one* which it is sought to enforce by the suit'; but can it be said that a suit against the surety is not one to enforce payment of the principal debt? The surety is under no liability except on the basis and to the extent of that of the principal; the contract itself is (in the terms of S. 126 of the Contract Act) to discharge the liability of the principal; and unless words are to be taken in a very narrow sense, in which case no man's liability can be said to be *identical* with that of another man, it is difficult to see anything unreasonable in holding that the 'debt' is the same as regards both principal and surety. The decision in *Sreenivasa* v. *Echammal* [3], merely follows *Gopal* v. *Gopal* [4], and does not carry the argument any further.

The decision in *Cockrill* v. *Sparkes* [5], referred to in *Gopal* v. *Gopal* [4], suggests another line of argument (though the Bombay Judges do not adopt it). It was there held that a part payment

1. (1885) L. R. 30 Ch. D. 291.
2. (1889) L. R. 43 Ch. D. 106.
3. (1910) 21 M. L. J. 455.
4. (1903) I. L. R. 28 B. 248.
5. (1863) 1 H. & C. 699.

by the principal debtor would not prevent the running of time as against the surety, because of the provisions of the Mercantile Law Amendment Act (corresponding to Cl. 2 of S. 21 of Act IX of 1908) relating to joint contractors etc. It is suggested by the learned Judges who decided *Velayuthan* v. *Vythilingam* [1] that the decision in *Gopal* v. *Gopal* [2] may perhaps be supported on this ground and the question was decided by Seshagiri Aiyar, J. in *Kothandarama* v. *Shanmugam* [3], on this very ground. This argument was also pressed in *Allison* v. *Frisby* [4]; Cotton, L. J. met it by saying that S. 14 of the Mercantile Law Amendment Act did not (as already pointed out) apply to cases falling under S. 8 of the Real Property Limitation Act, 1874 or the corresponding S. (40) of 3 and 4 William IV C. 27; the other two Lords Justices do not refer to the point. This does not necessarily show that the contention is sound in other cases; indeed the distinction thus made shows that the learned Judges did not regard the rule as merely illustrative of a general principle. In view of the observations of Cotton, L. J. himself in *In re Powers* [5], it is doubtful if *Cockrill* v. *Sparkes* [6] can be applied to cases of suretyship properly so called. The earlier case, he pointed out, was one "of a joint and several note by two persons, one of whom was in fact only a surety", *i. e.*, a case similar to the illustration to Sec. 132 of the Indian Contract Act; and in that view both the executants stand on the same footing, so far as the creditor is concerned. (The same was the case in *Kothandarama* v. *Shanmugam* [3]). But can that be said of an ordinary contract of suretyship where the conditions of the surety's liability to the creditor are essentially different from those attending the liability of the principal debtor. Can the mere fact that ordinarily, the liability of principal and surety is co-extensive make them 'joint contractors.' Seshagiri Aiyar, J. relied on Sec. 43 of the Contract Act, referring evidently to the explanation. But the context as well as illustration (d) clearly show that the provision has reference to the very class of cases provided for in S. 132. In any event, the argument cannot apply to cases in which the suretyship is subsequent *i. e.*, in respect of a pre-existing debt of another; for in that case the surety and the principal debtor can in no sense be described as 'joint contractors; and it will be anomalous that S. 20 of the Limitation

1. (1912) 24 M. L. J. 66.
2. (1903) I.L.R. 28 B. 248.
3. (1915) 32 I. C. 608.
4. (1889) L. R. 43 Ch. D. 106.
5. (1885) L.R 30 Ch. D. 291.
6. (1863) I.H. and C. 689.

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Act should have one kind of operation when the contract of suretyship was contemporaneous with the creation of the principal debt and another, in cases where it came into existence subsequently.

In *Kothandarama* v. *Shanmugam* [1], Seshagiri Aiyar, J. takes a wider view. He holds that S. 21 (2) is merely illustrative of a general principle, that the enumeration therein is not exhaustive of the cases in which it is intended to protect a person from the consequences of acts not his own, so that, even if principal and surety cannot be brought under the description of 'joint contractors' (they cannot of course be brought in under any of the other classes specified there), the *principle* of the section will apply to their case as well—in fact, to all cases where there is a question of the liability of several persons and it is sought to extend time as against one of them on the strength of any act of another. The result of such a view may be substantially unexceptionable in the case of 'acknowledgments', but as a principle of construction of S. 21 (2), so as to apply it to 'part-payments' or 'payments of interest' as well, it is open to question; for the result, then, would be that a payment can never avail to save limitation except as against the person making it, (subject of course to the doctrine of agency, express or implied which is specifically recognised in S. 20). Such a position is not only inconsistent, as already observed, with the whole course of English case-law but fails to give any effect whatever to the difference in language between S. 19 and S. 20 as to the person by whom an 'acknowledgment' and 'payment' may be made. In view of the marked difference in language between 19 and 20 and of the principle explained in *Lewin* v. *Wilson* [2] the learned Judge's dictum that acknowledgments and payments stand on the same footing cannot be unreservedly accepted. The further remark that there is no provision in the English Law corresponding to S. 21 (2) evidently overlooks S. 14 of the Mercantile Law Amendment Act. In view of the broad proposition laid down by him as to the principle of Ss. 20 and 21, we must confess ourselves unable to follow his observation that cases like *Krishna Chandra* v. *Bhairab Chandra* [3] and *Domi Lal Sahu* v. *Rasham Dobay* [4] do not touch the question; for there a payment of

1. (1915) 32 I. C. 608.
2. (1886) L. R. 11 A. C. 639.
3. (1905) I. L. R. 32 C. 1077.
4. (1906) I. L. R. 33 C. 1278.

interest by the mortgagor was held sufficient to save limitation even against the assignee without reference to any authority from or even the knowledge of the assignee as regards the payment. (See also *Hem Chandra Chaudhuri* v. *Purna Chandra Chaudhuri*[1]).

With reference to the argument that S. 21 (2) is merely an illustration or application of the general principle laid down as early as in Act XIV of 1859 (S. 4), that if more than one person be liable, none of them shall become chargeable by reason of a written acknowledgment signed by another, we have to point out that that enactment related only to 'acknowledgment' and not to part payment or payment of interest which was not recognised in the Act of 1859 as giving a fresh starting point for limitation and that in Act IX of 1871, by which the provision about part payment or payment of interest was first introduced in India, no exception was made to that rule in the case of joint contractors &c. As regards acknowledgment, the general proviso to S. 4 of Act XIV of 1859 gave place to a specific exception in the case of partners and executors.

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(*To be continued.*)

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1. (1914) 22 I. C. 510.

SUMMARY OF ENGLISH CASES.

Jones *v.* **Jones and another**: (1916) 2 A. C. 481.

Slander—School-master—Words imputing moral misconduct—No Special damage—Words not spoken touching his calling.

Words imputing adultery to a school-master, in the absence of special damage, are not actionable as slander unless they were spoken touching or in the way of the school-master's calling. The fact that moral misconduct with a married woman cannot fail to be injurious to the office of school-master as to any other office will not make the imputation actionable slander.

Great Central Railway Company *v.* **Hewlett**: (1916) 2 A. C. 511.

Negligence—Obstruction in highway—Legislation by Statute—Lighting regulations during war—Obstruction not visible in a dark night—Accident.

Where a Railway Company was by a private Act of Parliament authorised to maintain certain gate posts which they had built before the passing of the Act, in the highway, and a cabman drove againt the gate posts and thereby sustained damage in a dark night by reason of the lights on the highway near the gate posts being dimmed by the lighting regulations due to war, the Railway Company was not liable for negligence, as they were not bound to do anything positively but merely to maintain the gate posts which had been built already.

Mahomed Syedol Ariffin *v.* **Yeoh Ooi Gark**: (1916) 2 A. C. 575.

Evidence—Straits Settlements Ordinance III of 1893, S. 32 sub-S. 5 and illustration (l)—Date of birth—Statement by the father of the date of birth—Construction of Statute—Illustration, repugnancy to the section.

A statement by a father stating the date of the birth of the son is admissible under S. 32 (5) and illustration (l) of the Evidence Ordinance, which corresponds to S. 32 (5) and illustration (l) of the Evidence Act. Illustrations appended to sections of a Statute should be accepted, if that can be done as being of relevance and value in construing the text; they should be rejected as repugnant to the section as the last result of construction.

British Union and National Insurance Co. *v.* Lawson: (1916) 2 Ch. 476, C. A.

Indemnity—Contract of—Assignability—Measure of liability of indemnified—Contract to indemnify insolvent-debtor—Effect.

A contract of indemnity is not a mere personal contract and is capable of assignment.

The measure of the liability of the indemnifier is not the capacity of the indemnified to pay, but his liability to pay.

In the case of an insolvent debtor a contract to indemnify him has the same result as a guarantee to the principal creditor of payment of the debt.

Schwann *v.* Cotton: (1916) 2 Ch. 459. C. A.

Easement—Continuous and apparent Easement—Devise of two properties with appurtenances—One property enjoying at time of devise water through pipe in other property—Water conducted from well on stranger's tenement—Implied grant of Easement —Servient tenement transferred to bona fide *purchaser for value without notice—Possibility of lawful interruption of water by stranger—Effect.*

Where the owner of two pieces of land A and B who enjoyed in respect of piece A, a supply of water by means of a pipe in piece B, devised them both to different persons together with the appurtenances, *held* that the effect of the will was to devise piece A with the right of passage of such water as might flow through the pipe and that the devise of piece B was a devise subject to that right. *Held* further that piece B would continue to be subject to the right even in the hands of a *bona fide* purchaser for value without notice. *Held* also that the right of the owner of piece A was in no way affected by the fact that the supply to the pipe might at any time be cut off by the lawful interference of a third person.

A grant by an upper proprietor to a lower of a right to the accustomed flow of water through an artificial water course is in no way affected by the fact that the supply might at any time be cut off by the lawful interference of a third person.

Per *Warrington, L. J.*—Where the right claimed by the several proprietors depends upon user only the precautious nature of the original supply may affect the user of all the owners and prevent the acquisition by mere user of any legal right to a continuance.

Pearce *v.* **Bulteel**: (1916) 2 Ch. 545.

Trustee—Conveyance to cestui que trust *on footing that trusts are fulfilled—Release by* cestui que trust*—Effect on trust—*Cestui que trust *himself one of the trustees—Conveyance of legal estate by beneficiary to* bona fide *transferee—Transferee not affected by prior equities under trust—*Bona fide *transferee from trustee—Trustee making fictitious title —Transferee not affected by trust of which he was not aware—Partnership—Agreement between partners for conversion of joint into separate estate, and* vice versa *when complete.*

If trustees convey to the *cestui que trust* upon the footing that the trusts are fulfilled, and the *cestui que trust* releases the trustees, the trusts are determined, and none the less because the beneficiary was one of the trustees. In such circumstances a *bona fide* purchaser getting the legal estate from the beneficiary is unaffected by prior equities arising under the instrument of trust.

If a trustee holding property under one instrument of trust makes a fictitious title under another, a purchaser, who knew that he was dealing with a trustee, could not be affected by equities arising under a trust by which he did not know his vendor to be in any way affected.

The statement in Lindley on Partnership, 8th Edition, pp. 400-1, that in order that an agreement among partners may have the effect of converting joint into separate estate, or *vice versa,* the agreement must be executed, and not be executory merely, does not mean that what has to be done under the agreement must be entirely completed, but that nothing remains to be done to make the agreement operative.

In re **Hawkins**: **White** *v.* **White**: (1916) 2 Ch. 570.

Will—Construction—Legacy given out of residue—Partial interest in legacy undisposed of—Effect.

Generally speaking, so far as a specific fund or a legacy is given out of or so as to diminish residue and some partial interest in such a legacy, whether of the nature of capital or of the nature of income is undisposed of, that interest remains as or fails to be subtracted from or results to residue so as to augment the capital or the income for the time being of the residue. In such a case there is nothing to change the character of the income or capital of the particular fund so left undisposed of.

In re **Helliwell Pickles** *v.* **Helliwell** : (1916) 2 Ch. 580.

Will—Construction—Use of word of relationship in a loose sense—Effect.—Gift to nephews and nieces and their children—Inclusion of children of illegitimate sisters.

By treating or naming definite individuals as relations who are not strictly such, and by thereby indicating that he is using a word of relationship in a wider or looser sense than its strict sense, a testator may include in a general gift to relations of that class not merely the specially named individuals, but other persons who are in a corresponding position.

Halsey *v.* **Lowenfeld** (1916) 2 K. B. 707 C. A.

Landlord and Tenant—Lease before war—Lessee an alien enemy after war—Suit against him for rent on covenant under lease—Maintainability—Assignment of lease by lessee with covenant of indemnity —Lessee if can enforce covenant by third party or otherwise.

A lease granted before the war to one who since the war became an alien enemy is not either suspended during the war or determined, and an action can be brought during the war to recover from the lessee rent due under the covenant in the lease.

Where such a lessee assigned the lease with a covenant of indemnity against his liability for the rent, held he could not during the war enforce his right to indemnity by a third party notice because for the purposes of such notice the lessee must be regarded as a plaintiff and the assignee as a defendant.

James Morrison & Co. Ltd. *v.* **Shaw, Savill, and Albion Co., Ltd.** (1916) 2 K. B. 783 C. A.

Bill of Lading—"Intermediate Port"—Meaning—Tests—Deviation from agreed voyage—Loss through King's Enemies—Liability of shipowner—Conditions.

It is impossible to lay down any hard and fast rule by which it may be determined whether any particular port is an "intermediate port" within the meaning of a bill of lading. In construing the document all the surrounding circumstances must be taken into consideration, the size and class of ship, the nature of the voyage, the usual and customary course, the natural or usual ports of call, the nature and position of the parties in question. It is a question of fact in each case.

A shipowner, who breaks his contract of carriage by deviating from the voyage agreed upon, is liable for loss occurring even

through the King's enemies while the ship is on her deviating course, unless he can show that the loss or damage would have occurred if the ship had been on her proper course.

JOTTINGS AND CUTTINGS

Fusion :—THE demand for economy in the administration of the law has resulted in a resuscitation of the proposal for the amalgamation of the two branches of the profession. To the convincing reasons for opposing the proposal stated by MR. MELMOTH WALTERS may be added one important point emphasised by Lord Alverstone in his 'Recollections of Bar and Bench':—

> In my opinion the existence of a body of men who devote themselves solely to advocacy, and have little or nothing to do with the cases until they are brought to them for conduct in Court, has been of immense value to our English system of jurisprudence. The independence of the Bar, arising from the absence of any personal interest in the success of proceedings, has given them a position in public opinion which could not possibly be attained under any other system.

Mr. Melmoth Walters makes it clear that the members of the Law Society, though favourable to an increase in the facilities for transfer from one branch of the profession to the other, have been consistently opposed to fusion. The Bar has certainly shown no eagerness to welcome it, the only member of any eminence who has declared himself in favour of it being Sir Edward Clarke, who made a speech supporting it soon after his appointment as Solicitor-General in 1886. The weight of authority is, indeed, strongly against the proposal. Distinguished advocates who have had experience of both systems have recognised that the organic division of legal labour is advantageous. Mr. Benjamin, K. C., for instance, 'agreed'—so Lord Alverstone tells us—'that for a country with a long-established procedure, the English system was by far the best.' The extension of the jurisdiction of the County Courts—where, of course, Solicitors have a right of audience—constitutes, no doubt, a practical difficulty which eventually will have to be solved; but even here we cannot quite agree with Mr. Melmoth Walters that 'fusion' has practically come into existence. One of the great advantages of the present system is that litigants can easily enjoy the services of a specialist. Even in the County Courts the more important cases are not infrequently argued by barristers who

have specialised in particular branches of the law.—*The Law Journal, 2nd December 1916.*

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Lawyers in the New Ministry.—The number of lawyers in Mr. Lloyd George's Administration is larger than in Mr. Asquith's. This fact, so gratifying to the profession, seems to have escaped the attention of the acrimonious persons who were always complaining that the legal element in the old Ministry was too large. Eight lawyers hold positions of Cabinet rank in the new Administration, *viz.*, Mr. Lloyd George, Sir Robert Finlay, Lord Milner, Sir Edward Carson, Sir George Cave, Lord Robert Cecil, Mr. Duke, and Sir F. E. Smith. In the old Ministry there were seven. Mr. Asquith, Lord Buckmaster, and Mr. McKenna have ceased to be Ministers of the Crown ; while Mr. Lloyd George, Lord Robert Cecil, Mr. Duke, and Sir F. E. Smith, the other lawyers among Mr. Asquith's colleagues, remain. The four new lawyers in posts of Cabinet importance are Sir Robert Finlay, Sir Edward Carson, Sir George Cave and Lord Milner, who if not precisely a lawyer, is, like Mr. McKenna, a 'lawyer-like person,' since he was called to the Bar at the Inner Temple thirty-four years ago, and sought for some time to practise.—*The Law Journal, 16th December 1916.*

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The New Lord Chancellor.—The elevation of Sir Robert Finlay to the Woolsack has been regarded generally as a personal tribute to 'the father of the now practising Bar,' as the oldest and yet most active member of the profession has been called. But it is really much more than that, for the new Lord Chancellor is not only one of the most experienced of international jurists, but is also an expert *facile princeps* in all the varied constitutional and social systems of our colonies and dependencies. If it should be the good fortune of the present Government to bring about the peace which all desire, the head of the English judiciary will naturally take a great place in the discussion of the terms of settlement, and also in the re-arrangement of our relations with the Allied Powers and our own Dominions. In the ripe judgment and widely accepted authority of the new Lord Chancellor the country possesses a guarantee for a sound and enduring solution of these great problems.—*The Law Journal, 16th December 1916.*

The New Law Officers.—If, as we presume, Sir Frederick Smith had the opportunity of occupying a higher office in the Ministry, he has the satisfaction of knowing that both branches of the profession are pleased that he retains a position which he fills with marked ability and dignity. His large acquaintance with international law is of special value in the performance of the Attorney-General's duties at the present time. Sir George Cave, whose appointment as Home Secretary is a well-deserved recognition of his Parliamentary gifts, though his old colleagues at the Chancery Bar regret that his connection with the profession has become less intimate, is succeeded in the office of Solicitor-General by Mr. Gordon Hewart, K. C., M. P., who has achieved, at the comparatively early age of forty-six, a distinguished place at the Common Law Bar. Both the Woolsack and the two Law Officerships are again held by members of that Bar. Sir George Cave, who became Solicitor-General twelve months ago, was with the exception of Lord Buckmaster, the only Chancery lawyer who had been a Law Officer since Sir John Rigby ceased to be Attorney-General twenty-three years ago. In his appointment as Home Secretary, however, the Chancery Bar enjoys a new distinction. Though the Home Secretaryship has in recent years been held more often by a lawyer than a layman, Sir George Cave is the first Chancery lawyer to hold the office.—*The Law Journal, 16th December 1916.*

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The Late Sir Roland Vaughan Williams.—In the passing away of the venerable ex-Lord Justice who presided for so many years and with such notable vigour over Appeal Court II, there has gone one of the outstanding figures in English law. Heredity, which is more pronounced in the legal profession than in any other, was most marked in this son of a famous judge and descendant of the 'renowned Serjeant.' And the great reputation which he inherited he has handed on with enhanced value to his successors. A great master of the Common Law in which he was reared, he preserved in his work as a judge all the refinement, the subtlety, and the accuracy which distinguished the classic models of the old system. And he will long be remembered by the elaborate judgments enshrined in the Reports in which he worked out the transformation to the new order of things—for he was learned in equity, too—a pundit in both branches of the

law. For his own generation his memory will be kept green by the humanity of his methods, as well as the sanity of his judgments.—*The Law Journal, 16th December 1916.*

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The Etiquette of the Bar.—A member of the English Bar who makes an affidavit in a case in an English Court as to foreign law assumes the character of a witness and ought not, therefore, to hold a brief for any party to the proceeding.—*The Law Journal, 16th December 1916.*

CONTEMPORARY LEGAL LITERATURE.

In the *Harvard Law Review* for November, 1916, Mr. Jenks who as the Editor of the well-known Digest of Civil Law is peculiarly competent to express an opinion on the subject offers certain remarks on the general nature of the English Civil Law. He claims and rightly that his Digest is the best refutation of the obscurantist theory that the English Law is incapable of being stated in the form of simple rules or principles but he doubts whether the English Law is yet ripe for codification. Another lesson which he has learned from his labours in connection with the Digest is, he says, a realisation of the extraordinary inequalities which mark the different parts of the Civil Law of England. The English Law of Contract for example is scientific and complete while the English Law of real property though minute in some directions is incomplete in others and on the whole looks to an outsider, in the highest degree arbitrary. It is very poor in family law and the law of torts. To say that the law of trusts takes the place of family law is an inadequate explanation. English law is innocent of any substantive definition of tort. The characteristic feature of the English law of torts is the importance it attaches to acts as distinguished from omissions. Mr. Jenks suggests that it is due to the quasi-criminal character of the early remedies in tort. It is markedly visible in the comparative scantiness of the English law of negligence. Another characteristic of the English law is the preponderance of judge-made law over statute law, 2 to 1 being the proportion.

Another article of interest deals with State liability for tort. The writer shows the utter unsatisfactoriness of the common law rule "the king can do no wrong" especially

now when the state embarks upon many undertakings which private individuals used previously to carry on and suggests a statute making state liable in ordinary courts on all causes of action sounding in tort or in contract. Partial recognitions of this principle there have been by various statutes in America and effect has been given to it largely in the Dominions and in India. The writer is against the Continental system of separate courts for the trial of such causes of action. In another article, Mr. Weston questions the correctness of the rule laid down by the Massachusetts Court on the liability of promoters to the company for unfair sales of their property to the company. His argument is that the party entitled to sue in such cases is not the company but the subscribers who may have been deceived by their conduct. The very exceptions recognised by that court, *e.g.*, where the subscribers of the shares were the promoters themselves or when at any time the shares become vested in the promoters or when the promoters disclose the fact to the subscribers, show that the essence of the liability is deception practised on the subscribers.

To the University of Pennsylvania Law Review for November. Mr. Warren Seavey contributes an informing article on the subject of *notice through an agent.* The writer thus summarises the result of the cases:

1. Where one bases his rights upon the giving of notice to another, the notice must be given to one who at that time was authorised or held out as authorised to act for the other in the matter of the receiving of the notice. If this is done it is immaterial whether the agent was perpetrating a fraud on the principal unless this was known to the giver of the notice.

2. Where the right is based upon the possession of knowledge of another, some fault in that other or his agent must be shown. If the agent with knowledge is one through whose act the principal claims, the latter is bound irrespective of the method of the acquisition of the knowledge or of any unlawful frame of mind on the part of the agent. If the principal acquires title independently of the act of the agent with knowledge but the latter has an obligation to divulge or to act in reference to it, the principal is bound if the agent negligently or wilfully fails to perform his duty unless such failure was a consciously wrongful act. But even in the latter case as in all others, the principal is liable if he personally is at fault. Where

neither he nor his agent is at fault, there is no liability and no imputed knowledge. Conversely when the agent acts without knowledge a principal should be liable as though the agent had the knowledge when first absolute notice has been given, secondly where there is an obligation upon the principal to inform the agent or a duty upon the agent to inform himself from the records of his principal or otherwise.

Judicial Powers of interpretation under foreign Codes is the subject of another article in the same journal. The Swiss Code seems to confer the largest powers on the Court. The 1st article of that Code says that the written law governs all matters to which either the letter or the spirit of the Code apply. In the absence of a provision of law applicable to the case he is to decide according to custom and in the absence of custom according to the rule which he would establish if he were acting as a legislator. This provision is in part based on the French model. Art. 4 of the French Code provides that the Judge who refuses to render judgment under pretext of the silence, obscurity or insufficiency of the law, may be prosecuted as guilty of denial of justice. Another rule of the French Code is that the judges may not render judgment in the form of general or regulative decrees of which the doctrine of *res judicata* is considered a species. Almost all the other codes which were more or less based upon French Code adopted the same rule (Spanish Code, art. 6, Chilian Code, arts. 3 and 24, Argentine Re-public Civil Code, S. 16). The German Code of 1900 omits all reference to any rules of interpretation or exposition possibly negativing the right of the Courts to do so.

The Law Journal, December 2, publishes a symposium of opinions of distinguished members of the law society on some interesting questions affecting law and the legal profession. One writer Mr. Dodd is in favour of many radical reforms, *e.g.*, he is for fusion of the two branches of the profession (another writer Mr. Walters is against it), for cutting off some, what he considers trivial causes of action, actions for breach of promise, libel and slander, for preventing cases from coming to Court at all by, for instance, substituting counsel's opinion for originating summons &c. Another writer (Mr. Richard King) discusses the advisability of admitting women to the legal profession. He has no objection to it though he is not enthusiastic about the prospects of their success in the profession. His inquiry in France seems to have brought him the information that ladies do

not generally shine in the profession, the only lady that was successful being a pretty woman whose success consisted in marrying a wealthy colleague in the profession. Mr. Brinsley Harper is for giving divorced ladies the new appellation of "legal widows".

BOOK REVIEWS.

THE JAINA LAW OF INHERITANCE AND PARTITION *by J. L. Jaini, M. A., Bar-at-Law.*

This attractive little book which forms one of the volumes in the Library of Jaina Literature published by the Central Jaina Publishing House, Arrah, is a translation (with the text) of a portion of what is claimed to be an important work of Jaina Law, the Bhadrabahu Samhita. The original (which is in Sanskrit) is substantially on the lines of the Hindu Metrical Smritis and the author is according to Jaina tradition said to have been a contemporary and preceptor of Chandragupta the Mauryan King. An extract from another legal work known as Indranandi Samhita is printed as Appendix A. In an interesting introductory note the translator (who is a Judge of the High Court at Indore) attempts to controvert the prevalent notion that the Jains have no law of their own and are, in the absence of special custom, governed by Hindu Law. (See also an elaborate discussion of the same point in a judgment delivered by the translator as Judge of the High Court which is printed as Appendix B.) But we cannot help saying that we are not much impressed with the answer that he gives to the question which he sets to himself; viz. after all, what is the practical loss to the Jains, if they are governed by the Hindu Law? And why should they have submitted to it for about a century if it was really repugnant to their instinct and to their religious and historical traditions? A perusal of the text of the book before us tends rather to confirm one in the belief that the Jain Law was substantially the same as the Hindu Law.

It may be interesting for instance to note that some of the verses at pages 36, 49 and 50 distinctly refer to Pindadana and one of them speaks of getting the inheritance and offering oblations as if they are closely connected matters. The verses relating to the adopted son also bear a close resemblance to the corresponding texts in the Hindu Law books except for the reference to 'affection' instead of religious utility. There are of course several provisions relating to other matters which are not identical with the present day rules of the Hindu Law, but it is

difficult to connect them with any peculiarity of Jainism and the difference is easily accounted for by the absence of the later stages of development known in the Hindu Law. The rules relating to exclusion from inheritance are also very similar to those of the Hindu Law. There are no doubt some marked differences in religious ideas between Hinduism and Jainism; but as to that the case law of the present day allows that such rules of the Hindu Law as are based on religious doctrines fundamentally inconsistent with Jainism are not to be applied to Jains.

THE LAWYER'S OFFICIAL DIARY, 1917—*The Lawyer's Companion Diary, 1917—Law Printing House, Madras.*

These diaries have been before the public for the last 5 years and their usefulness to the legal profession has been very great. As usual the diaries contain most of the legal information that a lawyer's clerk requires in his everyday life. We find that pages for the first three months of the year 1918 have been added to facilitate the recording of the engagements of the ensuing year. The get-up of the diaries is, as usual, excellent.

THE LAW OF WAR AND CONTRACT *by H. Campbell, Bar.-at-law, Bombay, published by the Oxford University Press, (Bombay and Madras) 1917.*

The present war has revived the study of a branch of law which ordinarily receives but little attention, *viz.*, that relating to the effect of war on Contracts; and the complexity of modern commercial and international life is such that even nations not directly connected with a war are nevertheless closely concerned with its effects on private contracts between subjects of the belligerent powers. In the course of the last year or two, several books have appeared, treating specially of this and cognate topics; and the handy little volume before us is a useful addition to that literature. The author must be congratulated upon the clear and simple way in which he has presented a somewhat unfamiliar subject. The facts connected with most of the important decisions noted are very fully stated and fairly copious extracts are given from the judgments, so that the book may not suffer in utility even in places where access cannot be had to a well furnished law library. The cases, including Indian decisions, have been brought down to November 1916.

'THE ADVOCATE.' HIS AIMS AND ASPIRATIONS; *by Cecil Walsh, M. A., K. C., Judge of the Allahabad High Court.*

A subject like the above is bound to be interesting and instructive when dealt with by one who has had experience of both sides—as they really are—of the administration of law, *viz.*, of the Bar and the Bench; and Mr. Justice Walsh has done a real service to the legal profession in India not merely by what he has said to his brethren at the Bar but also by what he has here and there suggested for the consideration of his brethren on the Bench. One cannot expect to find many new ideas in a book dealing with a subject that has been the theme of many a discourse in one form or another, but we have no doubt that the handy little work before us will amply repay perusal. We would specially commend to the attention of the younger members of the Bar, the chapters on 'Books to read' and 'Case-law and Case-worship and, for ourselves, we would gladly recognise the value of the remarks on reporting, in the latter chapter. Many of the suggestions in the course of the book and in Dr. Sundar Lal's supplemental chapter on the training of the Indian Vakil, deserve to be taken note of by the authorities responsible for the regulation of the Law Schools and Colleges in this country. To all members of the Bar, in this country, where we regret to say that the relations of the different branches of the profession and sometimes even the relations *inter se* of the members of each branch are not what they ought to be, we venture to commend the ideas in the chapter on '*Esprit de Corps.*'

PATNA LAW WEEKLY: *Published at Bankipore.*

We cordially welcome the new-comer and wish it a long career of vigorous and useful existence. With the creation of the new Patna High Court, it is no wonder that the need for a journal like this must have been keenly felt. A well conducted legal journal with the aims and ambitions set forth in the Foreword must, at least, be helpful in checking error, and stimulating thought, an achievement respectable enough but eventually may be able to realise its great ambition of "standing up for justice and upholding the great traditions associated with what may be called the Reign of Law." Naturally, the journal will contain comments on all matters falling within the province of law.